IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63038-5-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
GORDON ERNEST WILLIAMS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: May 24, 2010
	)	

Ellington, J. — When a prior conviction is an element of the crime, a certified copy of a judgment and sentence is insufficient, standing alone, to prove the prior conviction beyond a reasonable doubt. Gordon Williams was convicted of felony violation of an order, which requires the State to prove the defendant has at least two previous convictions for violation of an order. Because the State offered no independent evidence that Williams is the same Gordon Williams whose name appears on two judgments and sentences, the State's proof failed, as the State concedes. We reject Williams' claim of prosecutorial misconduct, and reverse and remand with instructions to enter judgment on the lesser included offense of misdemeanor violation of an order.

FACTS

In the early morning of August 2, 2008, Seattle Police Officer James Moran

responded to an anonymous 911 call of a disturbance in the dog park at Boren Avenue and Pike Street. At the park, Officer Moran found Gordon Williams and a woman identified as Gina Curley drinking beer together. Upon a check of identification in the Department of Licensing (DOL) database, Officer Moran learned there was a no contact order in place against Williams for the protection of Gina Curley. Officer Moran arrested Williams. The State charged Williams with felony violation of an order.

At trial, a redacted version of the 911 call was played for the jury and Officer Moran testified to the circumstances of Williams' arrest. When he arrived at the dog park, Officer Moran saw two individuals, a man and a female, matching the description given by the anonymous caller. The two individuals were engaged in conversation and both were holding open beer cans. The woman identified herself as Gina Curley and she matched the physical description associated with that name in the DOL database. Officer Moran recognized the person shown in a Washington State identification card for a Gina Curley, introduced at trial as an exhibit, as the woman he found in Williams' company. In the five months since the events, Officer Moran had made more than 100 identifications.

The woman became upset when Officer Moran arrested Williams. She stated she did not want the police involved and refused to provide a statement. Both Williams and the woman claimed they did not know each other.

Among other exhibits, the State introduced certified copies of two judgments and sentences for violation of a no contact order, both in the name of Gordon Williams.

The jury convicted Williams. He appeals.

DISCUSSION

Violation of a court order is a felony if the defendant has two or more previous convictions for similar offenses.[1] Williams argues the State failed to prove beyond a reasonable doubt that he had two such previous convictions. When a prior conviction is an element of the substantive crime being charged, a certified copy of a prior judgment and sentence is insufficient.[2] The State must show by independent evidence that the person named in the judgment and sentence is the defendant in the present action.[3] There is no such independent evidence here.

The State concedes insufficiency of the evidence as to the prior convictions. We accept the State's concession.

Williams also argues prosecutorial misconduct. Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[4] Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict.[5] The defendant bears the burden of showing both prongs of prosecutorial misconduct.[6]

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[1] RCW 26.50.110(1), (5).

[2] State v. Harkness, 1 Wn.2d 530, 543–44, 96 P.2d 460 (1939).

[3] Id.; see also State v. Hunter, 29 Wn. App. 218, 221–22, 627 P.2d 1339 (1981) (certified copies of judgments and sentences along with testimony of work release supervisor identifying defendant as individual who worked at work release facility following his convictions deemed sufficient independent evidence to prove the defendant was the same person identified in the judgments); State v. Brezillac, 19 Wn. App. 11, 13–14, 573 P.2d 1343 (1978) (State established prima facie case of identity in habitual criminal proceeding by introducing certified copies of prison records that had photographs, front and profile, age, detailed physical description, and name of defendant's wife).

[4] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

[5] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

[6] Hughes, 118 Wn. App. at 727.

A defendant must object contemporaneously to the prosecution's improper comments during closing argument.[7] Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[8]

Williams argues the prosecutor impermissibly shifted the burden of proof when she argued that if the woman in the park was not Gina Curley, she would have "come forward" and clarified that she, and not Gina Curley, was with him that day.[9] Williams did not object to this remark.

A criminal defendant has no burden to present evidence, and it is generally error for the State to suggest otherwise.[10] But the prosecutor may make a fair response to the arguments of defense counsel.[11] It is not misconduct, therefore, for a prosecutor to argue that the evidence does not support the defense theory.[12]

In this case, the defense strategy was to cast doubt on Officer Moran's identification of the woman. In closing argument, defense counsel speculated that some woman, familiar with Gina Curley and the existence of the no contact order, might

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[7] See State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000).

[8] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

[9] Report of Proceedings (RP) (Jan. 15, 2009) at 56.

[10] State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). However, under the missing witness doctrine, the State may point out the absence of a "natural witness" when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable. Id. The missing witness doctrine is not at issue in this case.

[11] Russell, 125 Wn.2d at 87.

[12] Id.

have used that knowledge against Williams:

> We don't know anything about that, that day. We don't know if she was best friends with Gina Curley, we don't know if they were sisters, we don't know if they were cousins, we don't know if they were roommates, we don't know what information that woman that day has about Gina Curley. Maybe she knew she had the no contact order against Mr. Williams, let's use the facts to tell the police. We don't know that, none of that evidence is here.[13]

In rebuttal, the prosecutor argued:

> If that woman was not Gina Curley, she obviously was upset that the Defendant was being arrested, did not want the Defendant arrested. *If she's not Gina Curley and the Defendant has committed no crime, she has not come forward at all and said it was me with the Defendant that day, it wasn't Gina Curley.* If it was her sister or her cousin or best friend (inaudible) for whatever reason (inaudible). These questions, we don't have any evidence to support any of these questions . . . . Why would she have the reaction that she did? Because you assume that Gina Curley's sister, roommate, cousin didn't know that there would be a no contact order in place, but the officers would obviously find it and why did she have (inaudible) reaction (inaudible). She would have known that when she (inaudible). If this woman wasn't Gina Curley, why else would the Defendant and Ms. Curley have denied knowing each other when they obviously did . . . .[14]

Viewed in context, the prosecutor's comment was one argument among several suggesting that the woman's behavior was consistent with her identification as Gina Curley and that the evidence did not support the defense theory that a woman who knew Gina Curley might have assumed her identity. This was proper argument.

Further, the remark did not improperly shift the burden of proof. The isolated statement at issue here is fundamentally different from the one in State v. Traweek,[15] the case Williams relies on:

> Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other

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[13] RP (Jan. 15, 2009) at 55.

[14] Id. at 56–57 (emphasis added).

> witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it [been] presented if there are explanations, which there aren't?[16]

Here the prosecutor did not argue, or even suggest, that Williams has a duty to put forward exculpatory evidence. The statement focused exclusively on Curley's behavior, and the inferences that could be drawn from it.

Williams fails to demonstrate the prosecutor's statement was improper, let alone flagrant and ill intentioned. He also fails to explain why a curative instruction would not have sufficed. Williams did not prove prosecutorial misconduct.

We must now decide what remedy is proper in this case. When the evidence is insufficient to support a conviction on the charged offense, an appellate court may direct that the defendant be resentenced on a lesser included or lesser degree offense.[17] The critical consideration in making this determination is not "whether the jury was instructed on the lesser included offense, but rather whether the jury necessarily found each element of the lesser included offense in reaching their verdict on the crime charged."[18]

Violation of a court order is a gross misdemeanor.[19] The offense is elevated to a class C felony if, at the time of the violation, the defendant had at least two previous

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[15] 43 Wn. App. 99, 715 P.2d 1148 (1986), overruled in part by State v. Blair, 117 Wn.2d 479, 485–91, 816 P.2d 718 (1991) (holding that to the extent Traweek indicates that the State can never comment on the defendant's failure to call witness or produce evidence, it is overly broad; outlining the contours of the missing witness doctrine).

[16] Traweek, 43 Wn. App. at 106.

[17] State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996); State v. Gilbert, 68 Wn. App. 379, 384–85, 842 P.2d 1029 (1993).

[18] Gilbert, 68 Wn. App. at 385.

[19] RCW 26.50.110(1).

convictions for violating the provisions of an order.[20] Because all the elements of the misdemeanor violation are necessary elements of the felony violation, misdemeanor violation of a court order is a lesser included offense of felony violation of a court order.[21] Thus, in order to find William guilty of felony violation of a court order, the jury necessarily found beyond a reasonable doubt all the facts rendering him guilty of misdemeanor violation of a court order.

Williams does not argue insufficiency of the evidence that he violated a court order. Complete reversal is therefore not warranted.

We therefore reverse and remand with instructions to enter judgment and sentence for misdemeanor violation of a court order.

Ellington, J.

WE CONCUR:

Grau, J.

Leach, A.C.J.

[20] RCW 26.50.110(5).

[21] See State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004) (to be a lesser included offense, "each of the elements of the lesser offense must be elements of the offense charged").